IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

:: ORDER ::

Prahlad Singh

vs

The President District Consumer Disputes Redressal Forum,Bikaner & Ors.

S.B. CIVIL WRIT PETITION NO.1103/2005
UNDER ARTICLE 226 AND 227 OF THE CONSTITUTION OF INDIA .

DATE OF ORDER : 25.4.2005.

PRESENT
HON'BLE MR. PRAKASH TATIA,J.

REPORTABLE

Mr.SD Vyas, for the petitioner.

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The writ petition has not yet been admitted and the petitioner has submitted an application for amendment of the writ petition to add certain new grounds.

Looking to the stage at which the application has been moved and looking to the fact that petitioner wants to take certain new grounds only, the application for amendment of the writ petition is allowed.

The amended writ petition has already been filed by the petitioner, is taken on record.

Heard learned counsel for the petitioner.

According to learned counsel for the petitioner, Ramnarayan and Udaram both submitted a complaint before the District Consumer Forum, Bikaner on the basis of joint contract with the petitioner alleging that the petitioner agreed to dig a well for Ramnarayan and Udaram. It is alleged by the said Ramnarayan and Udaram that the petitioner assured that he will show the discharge of the water to the extent of 10,000 galleon per hour for 16 hours and, therefore, the complainants took a loan for installing the tube-well and gave the contract to the petitioner to dig the tube-well. The complainants found that the well is not working, therefore, they obtained expert report, which also confirmed that the tub-well is not according to the assurance given by the petitioner and, therefore, the complainants Ramnarayan and Udaram entitled for the damages from the petitioner. The complainants' claim petition was contested by the present petitioner-non-applicant on various grounds and the District Consumer Forum by order dated 10th July, 1985 rejected the complainants' complaint.

The complainants preferred appeal jointly against the petitioner-

non-complainant before the Present, State Consumer Disputes Redressal Commission Rajasthan, Jaipur (for short State Commission). The State Commission vide order dated 11.3.2002 allowed the appeal of Ramnarayan and Udaram. The petitioner aggrieved against the order of the State Commission, Jaipur dated 11.3.2002 preferred a revision petition before the National Consumer Disputes Redressal Commission, New Delhi and in that revision petition, the present petitioner-non-complainant submitted an application under Order 22 Rule 3, 9 and 11 and under Order 41 Rule 5 CPC stating therein that during the pendency of the appeal before the State Commission, the complainant Ramnarayn died, but no application has been submitted by the surviving appellant for brining on record the legal representatives of the deceased Ramnaryan and, therefore, in fact, the appeal abated before its decision and the order passed by the State Commission finding petitioner liable for the amount is nullity.

The National Consumer Disputes Redressal Commission, New Delhi vide order dated 6.2.2003 after rejecting the petitioner's objection about the abatement of the appeal before the State Commission, rejected the revision petition of the petitioner on merit.

After having decision from the appellate court and the revisional forum when the complainant Udaram did not receive benefit under the

order from the petitioner, he submitted an application under Section 25/27 of the Consumer Protection Act, 1986 wherein an objection has been submitted by the petitioner raising same objections that since Ramnarayan died during the pendency of the appeal before the State Commission, therefore,the order passed by the State Commission is nullity and cannot be enforced against the petitioner. That objection was rejected by the District Consumer Disputes Redressal Forum, Bikaner vide order dated 20.10.2004. Against this order, the petitioner has preferred this writ petition.

According to learned counsel for the petitioner as per Section 45 of the Indian Contract Act, 1872 where there is a joint promise then unless a contrary intention appears from the contract, the right to claim performance survives till the life of the contracting parties, who jointly entered into contract. It is submitted that after the death of one of the joint contracting parties, the cause can survive alongwith the legal representatives of the said deceased person jointly with the survivor and in this case, admittedly one of the contracting parties namely, Ramnarayan died during the pendency of the appeal before the State Commission and admittedly, none of the legal representatives of Ramnarayan were brought on record in appeal before State Commission. Learned counsel for the petitioner, relied upon the judgment of this Court delivered in the case of Moolchand Vs. Renuka Devi & Ors reported

in AIR 1973 Raj. 63 wherein learned Single Bench of this Court held in the year 1971 that suit for ejectment and recovery of rent by a co-mortgagee/lessor alone instituted after the death of the other co-mortgagee/lessor, would not be maintainable without impleading the legal representatives of the deceased co-mortgagee/lessor.

I considered the submissions of learned counsel for the petitioner. The writ petition of the petitioner is liable to be dismissed only on the ground that the petitioner's said objection was an objection as "pre-decree matter" only. The said objection in fact, was taken by the petitioner in revision and that was rejected on merit by the revisional forum. That order has became final as it appears that order was not challenged by the petitioner. Therefore, even if a question of law has been decided by the competent forum illegally, it is binding and cannot be said to be an order wholly without jurisdiction so as to term as a nullity. Therefore, in view of that binding finding against the petitioner, the petitioner had no right to re-agitate the matter before the executing court, executing the order, which has been passed by the appellate forum and upheld by the revisional court and in which the same very point specifically has been rejected by the highest court in the hierarchy of the procedure provided under the relevant Act for deciding the complaints.

Secondly the order in favour of a dead person cannot be said to be a nullity and, therefore also I do not find any merit in the submission of the learned counsel for the petitioner that the order of the State Commission is nullity. It may be true that the order against a dead person may be nullity, but same principle is not applicable when the order is in favour of the dead person.

Thirdly on merit the Section 45 of the Indian Contract Act only provides procedure how the joint rights devolves. The Section 45 of the Indian Contract Act, 1872 is as under:

> **"45.Devolution of joint rights.-**When a person has made a promise to two or more persons jointly, then unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and after the death of the last survivor, with the representatives of all jointly."

A bare reading of Section 45 clearly reveals that it only provides how the rights shall devolve when there is a promise to two or more persons jointly. It deals with performance of the contract only and is not a provision dealingwith the cases where the parties or the survivors are not seeking performance of the contract, but claimed the damages for breach of contract. Therefore, Section 45 has no application to the facts of this case.

Fourthly and lastly for the sake of argument that the legal representatives should have been taken on record before the appellate court then admittedly one of the legal representative of Ramnarayan, his son, Udaram was already on record before the State Commission in appeal and, therefore, the estate of Ramnarayan was fully represented before the State Commission. It may be pointed out here that legal representatives and heirs may be even different. The heir is legal representative by virtue of his personal law. Here in this case, the heir himself was a party before the State Commission of the deceased though as joint contracting party with deceased Ramnarayan, therefore also, it is not a case of abatement either before the appellate court.

In view of the above discussion, the writ petition of the petitioner is dismissed.

(Prakash Tatia), J.

c.p.goyal/-